Green, LindaE

From: Katlyn M. Miller <Katlyn.M.Miller@wvago.gov>
Sent: Wednesday, April 06, 2016 4:57 PM
To: FOIA HQ
Cc: Zak J Ritchie; 'lee.rudofsky@arkansasag.gov'
Subject: New FOIA Request (corrected)
Attachments: EPA propaganda FOIA (final scan) (M0123266xCECC6)-c1.pdf

To Whom It May Concern:

Attached please find a FOIA request from the States of West Virginia and Arkansas. It is the same as the request previously sent, but with today's date corrected. We have also sent this document by certified mail. Please feel free to contact me if you have any questions.

Sincerely,

Katlyn M. Miller
Assistant Attorney General
Office of the West Virginia Attorney General
State Capitol
Bldg 1, Room E-26
Charleston, WV 25305
(304) 558-2021
(304) 558-0140 (fax)

OFFICE OF ATTORNEY GENERAL
STATE OF WEST VIRGINIA

PATRICK MORRISEY
ATTORNEY GENERAL

ATTORNEY GENERAL
STATE OF ARKANSAS
LESLIE RUTLEDGE

April 6, 2016

Via Certified Mail & Email

The Honorable Gina McCarthy
National Freedom of Information Office
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
hq.foia@epa.gov

Re: Freedom of Information Act Request From The States Of West Virginia and Arkansas Concerning EPA's Use of Thunderclap Social Media Platform In Association With The Clean Power Plan Rulemaking, EPA-HQ-OAR-2013-0602.

Dear Administrator McCarthy:

This letter is a request under the Freedom of Information Act, 5 U.S.C. § 552(a) *et seq.* (the "Act"), for information concerning EPA's use of social media platforms, specifically "Thunderclap," to publicize or promote the Clean Power Plan from the announcement of the proposed rule on June 2, 2014, through the close of the comment period on December 19, 2014.[1] In December 2015, the United States Government Accountability Office ("GAO") released a report finding that EPA violated certain publicity, propaganda, and anti-lobbying laws "through its use of social media in association with its rulemaking efforts" to define the Waters of the United States, or WOTUS, under the Clean Water Act. *See* U.S. Gov't Accountability Office, B-

[1] EPA announced its proposed rule on June 2, 2014. On June 18, 2014, EPA published the proposed rule in the Federal Register with a 120-day comment period. 79 Fed. Reg. 34,830 (June 18, 2014). EPA extended the comment period by 45-days on September 18, 2014. On December 1, 2014, the extended 165-day comment period ended. The EPA Administrator signed the rule as final on August 3, 2015 and published the final rule in the Federal Register on October 23, 2015. 80 Fed. Reg. 64,661 (Oct. 23, 2015).

326944, *Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions* 2 (2015), available at http://www.gao.gov/assets/680/674163.pdf. Based on the report's finding that EPA improperly cooperated with certain individuals and organizations to promote its WOTUS rule, we request information regarding the individuals and organizations identified below, all of whom have used or organized the use of the Thunderclap platform to publicize and promote the Clean Power Plan rule.

Several laws prohibit agencies from using appropriated funds for lobbying or publicity activities. Section 718 of the Financial Services and General Government Appropriations Act of 2014 prohibits the use of EPA's appropriations for unauthorized publicity or propaganda purposes. Pub. L. No. 113-76, div. E, title VII, § 718, 128 Stat. 5, 234 (Jan. 17, 2014). Section 715 of the Act prohibits the use of EPA's appropriations for indirect or grassroots lobbying in support of or opposition to pending legislation. *Id.* § 715. These same restrictions apply to EPA's fiscal year 2015 appropriations. Pub. L. No. 113-235, div. E., title VII, §§ 715, 718, 128 Stat. 2130, 2382-83 (Dec. 16, 2014). Section 401 of the Department of the Interior, Environment, and Related Agencies Appropriations Act of 2015 similarly prohibits the use of EPA's appropriations for grassroots lobbying. *Id.* § 401.

The Request

Accordingly, we request that you provide a copy of any documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2014, to December 31, 2014, regarding EPA's efforts to publicize or promote, or efforts to prepare to publicize or promote, the Clean Power Plan through social media during the comment period. This request includes, but is not limited to, documents:

1. Received from or sent to Thomas Reynolds, former associate administrator for public affairs at the Environmental Protection Agency, regarding the Clean Power Plan.
2. Received from or sent to Andy Wilson, former or current online organizer for the Sierra Club, regarding the Clean Power Plan.
3. Received from or sent to any employee of or member of Ceres or the League of Conservation Voters, regarding the Clean Power Plan.
4. Discussing EPA's or any other organization's use of social media platforms, including but not limited to Thunderclap, to publicize, promote, advertise, or endorse the Clean Power Plan.
5. Discussing ways to direct online users to outside organizations' web pages discussing the Clean Power Plan through hyperlinks or any other means.
6. Referencing any one or more of the following phrases in connection with the EPA's use of social media to publicize, promote, advertise, or endorse the Clean Power Plan:

    - Thunderclap or @ThunderclapIt
    - Clean Power Generation

- Clean Energy Economy
- Clean Power Plan Day of Action
- Beyond Coal Campaign
- #ActOnClimate or act on climate
- #CleanPowerPlan or #CPP
- #EPA
- #GenerateChange or generate change
- Join the Rally
- flood-the-zone
- #UnitedOnClimate
- Support the EPA's Climate Plan

This request reasonably describes the documents we are seeking, and would permit EPA officials to identify and locate those documents. Under FOIA, agencies like EPA are required to make "promptly available" records that are "reasonably describe[d]" in a request. 5 U.S.C. § 552(a)(3)(A); *see also* 40 C.F.R. § 2.102(c). The "reasonably describes" standard "'makes explicit the liberal standard for identification that Congress intended.'" *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 274 (D.D.C. 2012) (quoting S. Rep. No. 93–854, at 10 (1974)). *See also Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) ("A request reasonably describes records if 'the agency is able to determine precisely what records are being requested.'") (quoting *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (D.C. Cir. 1982)). Our request satisfies this "liberal standard" because it includes specific information regarding the "date," "author[s]," "recipient[s]," and "subject matter" of the documents sought. *Id.*

The Fee Waiver

We also request that you waive any applicable fees. "FOIA's fee waiver provision states that documents requested from a government agency 'shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.'" *Perkins v. U.S. Dep't of Veterans Affairs*, 754 F. Supp. 2d 1, 5 (D.D.C. 2010) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)); *see also Cause of Action v. FTC*, 799 F.3d 1108, 1111 (D.C. Cir. 2015). Where the requesters are public officials with no "commercial interest[s]," as here, a fee request must be given a liberal construction. *See Perkins*, 754 F. Supp. at 5; *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1282, 1284 (9th Cir. 1987) (the public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters"). The *only* question here is whether release of the information requested will be "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii).

The D.C. Circuit recently held that some of FTC's regulations interpreting the public interest waiver under FOIA improperly demanded more than the statutory text required. *Cause of Action*, 799 F.3d at 1115 (the agency "pressed erroneous interpretations of FOIA contained in its own regulations"). Giving "no particular deference to [the agency's] interpretation of FOIA," the D.C Circuit explained that "the text of the public-interest waiver provision indicates that such a fee-waiver application must satisfy three criteria." *Id.* (quotations omitted). "Disclosure of the

requested information must: (1) shed light on 'the operations or activities of the government'; (2) be 'likely to contribute significantly to public understanding' of those operations or activities; and (3) not be 'primarily in the commercial interest of the requester.'" *Id.* (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). As such, *Cause of Action* casts serious legal doubt on any EPA FOIA regulations governing the public interest waiver that demand more than the statutory text. Even so, this request easily satisfies the three statutory criteria set forth in *Cause of Action*, as well as EPA's FOIA regulations. *See generally* 40 C.F.R. § 2.107(l).

Criterion 1: The requested information—communications regarding the use of social media generally and social media platforms, including Thunderclap, to publicize the Clean Power Plan—sheds light on "the operations or activities of the government."

The first criterion is whether disclosure of the requested information "sheds light on 'the operations or activities of the government.'" *Cause of Action*, 799 F.3d at 1115 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). The requested records are necessary to assess the extent of EPA's activities on social media to publicize or promote the Clean Power Plan, a rule signed by the EPA Administrator as final on August 3, 2015, purportedly authorized by Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d). The requested communications will shed light on, among other things, the extent of EPA's involvement with or connection to Thunderclap campaigns and other efforts to publicize or promote the Clean Power Plan with outside groups or individuals during the rulemaking process. Therefore, any communications regarding EPA's use of social media platforms, including Thunderclap, unmistakably "sheds light on the operations or activities of the government," *Cause of Action*, 799 F.3d at 1115 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)), or, as EPA regulations require, "concern[s] identifiable operations or activities of the Federal government, with a connection that is direct and clear." 40 C.F.R. § 2.107(l)(2)(i).

Criterion 2: The information is "likely to contribute significantly to public understanding" of EPA's involvement in publicizing the Clean Power Plan through social media.

The second criterion asks whether the disclosure is "'likely to contribute significantly to public understanding' of those operations or activities." *Cause of Action*, 799 F.3d at 1115 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)); *accord* 40 C.F.R. § 2.107(l)(2)(ii). The D.C. Circuit explained that whether the requested information is "'likely to contribute *significantly* to public understanding' may . . . require assessment along two dimensions: [1] the degree to which 'understanding' of government activities will be advanced by seeing the information; and [2] the extent of the 'public' that the information is likely to reach." *Cause of Action*, 799 F.3d at 1116 (footnotes omitted) (emphasis in original). This assessment is plainly met here.

First, the disclosure of records sought in our request are "likely to contribute significantly" to an understanding of government operations or activities because these records

will "advance[]" public understanding of the extent of EPA's connection to or involvement with social media, including Thunderclap campaigns, to promote the Clean Power Plan. *Id.*; *accord* 40 C.F.R. § 2.107(l)(2)(iv). Thus even under EPA's FOIA regulations, the requested records will prove "meaningfully informative" about EPA's "operations or activities" because they will "increase[] [the] public understanding" regarding EPA's precise role in publicizing the Clean Power Plan using social media, specifically Thunderclap campaigns, and whether EPA's involvement, if any, could be in violation of prohibitions against publicity or propaganda and grassroots lobbying. 40 C.F.R. § 2.107(l)(2)(ii). These facts are particularly relevant here, because the GAO recently concluded EPA's use of Thunderclap and hyperlinks to external websites, in connection with a different rulemaking—the "Waters of the United States" or "WOTUS" rule—did violate these laws. *See* U.S. Gov't Accountability Office, B-326944, *Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions* 12, 17–18 (2015), available at http://www.gao.gov/assets/680/674163.pdf. The requested disclosures will undoubtedly advance public understanding of whether EPA's role in publicizing the Clean Power Plan on social media rises to an illegal level.

Second, the disclosures requested here will undoubtedly contribute to a "public understanding of a reasonably broad audience of persons interested in the subject," because all documents received pursuant to our request will be disseminated to the public through various, specific ways uniquely available to the West Virginia Attorney General and the Arkansas Attorney General. *Cause of Action*, 799 F.3d at 1116; *accord* 40 C.F.R. § 2.107(l)(2)(iii). Even so, this element "does *not* require that a requester be able to reach a 'wide audience.'" *Cause of Action*, 799 F.3d at 1116 (emphasis added). Moreover, the requester need *not* "identify several methods of disseminating the information it seeks." *Id.* (quotations omitted). Rather, as noted, "the relevant inquiry is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Id.* (quotations and ellipsis omitted); *accord Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003).

As the chief legal officers of their States and independent constitutional officers directly elected by the People, the West Virginia Attorney General and the Arkansas Attorney General have the ability and intention to convey the requested information to a reasonably broad audience of persons interested in the subject. *Cause of Action*, 799 F.3d at 1116; 40 C.F.R. § 2.107(l)(2)(iii). *See* W. Va. Const. art. VII, § 1; Ark. Const. art. VI, §§ 1, 3 & amdts. 56, 63, 73. Specifically, Attorneys General Morrisey and Rutledge will make all documents disclosed by EPA available to the general public. The documents will be made available in hard copy form at the main office of the Attorney General of West Virginia and the main office of the Attorney General of Arkansas. The documents will also be made available on the West Virginia Attorney General's website and Arkansas Attorney General's website. In both mediums, the documents will be available free of charge.[2] Attorneys General Morrisey and Rutledge will also

[2] *See generally* http://www.ago.wv.gov/publicresources/epa/Pages/default.aspx.

review the documents, describe them in an executive summary that highlights the most significant of the documents, and post that summary on their respective websites. Depending on the content of the documents, Attorneys General Morrisey and Rutledge may also publicize the disclosures through press releases to the entire media spectrum, media interviews with both newspaper and local television stations, and personal "town hall"-style discussions held throughout the States. In addition, depending upon the content of the documents, Attorneys General Morrisey and Rutledge may share the disclosed information with the Governor of each State and the elected leaders of each state legislature for further dissemination through the public's elected representatives. These specific and identifiable means by which Attorneys General Morrisey and Rutledge will publicize the disclosures are far more than "FOIA requires." *Rossotti*, 326 F.3d at 1314.[3]

* * *

In light of the importance of this inquiry to the public, we respectfully request that you disclose all responsive documents as soon as possible, but no later than 20 business days from receipt of this letter, as required under the Act. Should you assert that any of the material is exempt from disclosure, please redact the allegedly exempt sections and provide the remaining material. In each instance, please describe the redacted material in detail and specify the statutory bases for refusing to disclose the material. We reserve the right to appeal the withholding or deletion of any information. Because more than one party is listed as co-requestors, Patrick Morrisey, the Attorney General of the State of West Virginia, confirms that he is the primary authorized representative for communications regarding this FOIA request. Should you have further questions, please contact Assistant Attorney General Katlyn Miller, Office of the Attorney General of the State of West Virginia, who may be reached at 304-558-2021 or Katlyn.M.Miller@wvago.gov.

Thank you in advance for your prompt cooperation in this important matter.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

Leslie Rutledge
Arkansas Attorney General

[3] The third criterion—that the "[d]isclosure of the requested information . . . not be 'primarily in the commercial interest of the requester'"—is easily met here. *Cause of Action*, 799 F.3d at 1115 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). In no way do the disclosures requested in this case "further[] the commercial, trade or profit interests of the [States of West Virginia or Arkansas]." *Id.* at *8 n.8 (quotations omitted).